NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. XXXX, 18 Oct 2004.

UNITED STATES	)	DEFENSE REQUEST FOR WITNESS IN MOTION HEARING ON SUBJECT-MATTER JURISDICTION: GEORGE FLETCHER
v.	)	
SALIM AHMED HAMDAN	)	18 October 2004

1. Witness Request – George Fletcher – U.S. v. Hamdan.

2. George Fletcher is Cardozo Professor, Columbia University Law School. His address is XXXX. XXXX. XXXX. He speaks English.

3. George Fletcher is the leading scholar of criminal law in America today. He has published widely on notions of group criminal liability, as well as on military commissions. He has studied Military Commission Instruction No. 2 in detail, and will explain why the charge against Mr. Hamdan is not properly cognizable in a military commission. He will outline the treatment of conspiracy throughout history and is not only an expert on the law, but also on the history of conspiracy prosecutions.

4. Civilian defense counsel has spoken with Professor Fletcher and has read his publications.

5. The testimony of Professor Fletcher is to be used for Mr. Hamdan's motion regarding subject-matter jurisdiction (D17). He may also be referenced in the Separation of Powers motion (D20).

6. Civilian defense counsel had e-mail communication with Professor Fletcher on 8 October 2004, and Professor Fletcher indicated that he would be available to testify at Guantanamo during the scheduled time for Mr. Hamdan's motions.

7. Civilian defense counsel believes that the commission would greatly benefit from the live testimony of Professor Fletcher, as the leading expert in criminal law. In particular, Professor Fletcher could provide the commission with his reaction to the arguments advanced in the proceedings by both sides as to the charge of conspiracy, and whether it is appropriately brought before this military commission. The Defense does not agree to an alternative to live testimony as the issues are case dispositive and we cannot possibly contemplate all questions the Commission Members may have.

8. No other witness can be called to attest to notions of American conspiracy law and subject-matter jurisdiction. Professor Fletcher is the leading expert on American criminal law.

9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire commission against the influence of the sole member of the commission who has a law degree. We do not mean to suggest that that

NOTE by Assistant, 19 Oct. This document has been reformatted only to contain all the attachments associated with this motion. K.Hodges, 18 Oct 2004.

individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL
Civilian Defense Counsel

Attachments:
1. Defense Request for Witness – George Fletcher – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

	)	
	)	
UNITED STATES	)	DEFENSE REQUEST FOR
	)	WITNESS IN MOTION HEARING ON
	)	SUBJECT-MATTER JURISDICTION:
v.	)	GEORGE FLETCHER
	)	
SALIM AHMED HAMDAN	)	11 October 2004
	)	

1. Witness Request – GEORGE FLETCHER – U.S. v. Hamdan.

2. GEORGE FLETCHER is a professor at Columbia University Law School. His contact information is set forth on his curriculum vitae, which is attached.

3. George Fletcher is the leading scholar of criminal law in America today. He has published widely on notions of group criminal liability, as well as on military commissions. He has studied Military Commission Instruction No. 2 in detail, and will explain why the charge against Mr. Hamdan is not properly cognizable in a military commission. He will outline the treatment of conspiracy throughout history and is not only an expert on the law, but also on the history of conspiracy prosecutions.

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individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal
Civilian Defense Counsel

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

XXXX
Assistant to the Presiding Officer.

D27 - Hamdan Defense Supplement - Fletcher. 21 Oct 04

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

Proposition of George Fletcher:

I will testify to the following overall proposition: Background providers, who know of the illegal purposes of a conspiracy to which they provide routine fungible services, are not held liable for having joined the conspiracy. This means that the charge against Mr. Hamdan must be dismissed.

A long line of case going back to Learned Hand's opinion in United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff'd 311 U.S. 215 (1940), holds that background providers do not join the conspiracies to which they knowingly provide goods and services. This is most clearly the case in the cases in which the suspect sells goods that the buyers in the conspiracy could easily obtain on the open market. It would make no difference if instead of selling goods, the suspect provides fungible service easily available on the market. The cleaner that cleans and presses the suits belonging to a mafia don does the join the conspiracy merely because he knows of the don's illegal activities. The maid who cleans his house is no closer to having joined – regardless of her knowledge. An illustrative case is People v. Lauria, People v. Lauria, 251 Ca.App.2d 471, 59 Ca.Rptr.628 (1967), which reverses the prostitution conviction of a telephone answering service that provided services to a call girl ring with full knowledge of the call girls' prostitution. That the owner of the answering service knew of the illegal purpose did not make him part of the conspiracy.

A more difficult line of cases are those of suspect who lease premises to conspirators with full knowledge of their criminal purpose. The most recent precedent in this field is United States v. Blakenship, 970 F.2d 283 (7th Cir. 1992), in which Judge Easterbrook, writing for the Seventh Circuit, reversed the conviction of a defendant Lawrence who leased a trailer to a drug ring with full knowledge that the lessee intended to manufacture methamphetamine in the trailer. As Judge Easterbrook writes, "Lawrence knew what Zahm [representing the drug ring] wanted to do in the trailer, but there is a gulf between knowledge and conspiracy." The Court stresses that the "war on drugs" provides no excuse for interpreting and applying the law loosely in order to sweep up as many knowing background players as possible. He criticized the trial judge for mentioning the "war on drugs" as though the broader "war" were relevant to the guilt or innocence of a specific suspect. This admonition is worth repeating with regarding to efforts to persuade

the court with grim tales about 9/11 and appeals to the "war on terror."

Judge Easterbrook concedes that a lessor might be liable for joining a tightly drawn conspiracy specifically related to the purpose of the lease. For example, in one case, United States v. Giovannetti, 919 F.2d 1223, 1227 (7th Cir. 1990), a lessor was held liable as an accessory to an illegal gambling operation because the success of the determination determined whether he would receive his periodic payments.

Lessors of property with knowledge of intended illegal use come close to the line of liability. But chauffeurs and drivers do not. The driver is in the category of the maid or the answering services who provide fungible, easily replaced services. Of course, there are many cases of drivers held liable as accessories where they drive robbers or hit men to the scene of the crime. They are associates in the criminal plan -- not chauffeurs-for-all-purposes as Hamdan was. Hamdan drove for a thousand different tasks. Even if, as the government alleges, some of these trips end up delivering materials that the terrorists wanted to transfer from one place to another, these were not the run of the mill duties of Hamdan as chauffeur. He drove as a background service, not as a dedicated contribution to a criminal plot in the course of execution.

To hold Hamdan liable as the chauffeur would be like holding a chambermaid liable for homicide because she ironed the shirt that she knew a hit man would wear in engaging in murder for hire. Neither providing a service nor knowledge is sufficient. The critical question is whether the service promotes a specific criminal project. Background services do not promote anything. All criminal enjoyed a hundred different background services – from buying food to getting the mail. None of these services promote their criminal projects.

The important point to be learned from the cases from Falcone to Blakenship is that knowledge per se is never enough for a background provider to become a member of a conspiracy. The focus has to be on the action and the degree of contribution and facilitation. That is the only way to probe whether the provider of services associates himself or joins the conspiracy.

My testimony will therefore explain why the charge MUST be dismissed, because it does not state a violation of the laws of conspiracy, contrary to the Prosecutor's claims.

Finally, I believe that my live testimony is important. The issues in the case arise as the intersection of criminal and international law. It is hard to find books and major studies in this new field. I am writing a lengthy manuscript on these issues, to be published later with Oxford University Press. The text is an application of the theories of my book Rethinking Criminal Law to the field of international criminal law. Therefore there are many things I could say in testimony that are not yet available in print. Finally, I know the MCI2 inside and out and have good things to say about it, in comparison with the Rome Statute. I see the advantages in the approach taken by DOD. I am not biased toward the defense.

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE REQUEST FOR WITNESS: GEORGE FLETCHER 25 October 2004

The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense's Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.

2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness' *testimony* will be relevant. Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Fletcher stated his views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

Particularly, the area of expertise of this proposed witness falls squarely within the core competency areas of the counsel assigned to this case. In the witness summary, Professor Fletcher intends to tell the court his interpretation of United States conspiracy law. The practitioners assigned to this case deal with this subject routinely in their military practice and should be given the opportunity to present their positions on the matter before resorting to a battle of the experts. Despite the Defense assertion that this expert opinion will not based on the particular facts at issue in this case or that this expert will not apply the law to Mr. Hamdan's facts, this is exactly what is being done in the proffer for Professor Fletcher.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.

4. Response to paragraph 5. The Prosecution has no objections or supplements to this paragraph.

5. Response to paragraph 6. The Prosecution has no objections or supplements to this paragraph.

6. Response to paragraph 7. To the extent that the Prosecution's response to paragraph 3 contains arguments on both relevance and the need for this witness to testify live, that response is hereby incorporated. Additionally, the Defense provides no reasons why testimony by this witness, if allowed, could not be taken by telephone or video teleconference (VTC).

7. Response to paragraph 8. The Defense states that "no other witness can be called to attest to notions of American conspiracy law and subject matter jurisdiction." This would seem inconsistent with their request for Professor Danner who is an expert on "laws-of-war conspiracy doctrine." It goes without saying that one who is an expert on "laws of war conspiracy doctrine" would also have to have some expertise in American conspiracy

law. In fact, Professor Danner has opined that "principles derived from domestic criminal law have played an important role in the development of international criminal law." Allison Marston Danner and Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, Public Law and Legal Theory Working Paper No. 04-09 available at http://ssrn.com/abstract=526202.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.

9. Conclusion. . The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies[1] or in oral argument. While live "law expert" witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.

XXXX
Commander, U.S. Navy
Prosecutor

[1] On 21 October, the Defense requested a delay in filing replies to the Prosecution's responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	DEFENSE REPLY TO PROSECUTION RESPONSE TO DEFENSE REQUEST FOR WITNESS: GEORGE FLETCHER 27 October 2004

1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Fletcher, who turns out to be the greatest living scholar of criminal law, and in particular, the conspiracy doctrine in America.

As the supplemental material makes clear, Professor Fletcher has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of his testimony, and for this reason, merely incorporating his past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Fletcher's work into a defense brief is inappropriate for a second reason, because he is not in any way a defense counsel. The whole function of experts about the meaning of the law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts admit the testimony of law professors all the time. The prosecution cites irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart of the motions being decided by the commission. And because this commission is the

trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because his views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain his view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

2. Response to paragraph 6. No logistical difficulties with the transportation and testimony of the expert witness have yet arisen. The defense will deal with them at that time if they do so arise.

3. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

4. Response to paragraph 8. The testimony of Professor Fletcher, as the leading expert on the American criminal law and doctrines of conspiracy, is in no way cumulative with any other witness. Professor Danner's expertise, as explained in the opening brief as well as our Reply to that witness request motion, lies in *international* law, despite the Prosecution's attempt to pretend otherwise by lifting a sentence from a draft co-authored Article of hers that says nothing to the contrary. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether he is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

5. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Fletcher's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Fletcher when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers with a more lenient evidentiary standard) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and

fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal
Civilian Defense Counsel

LCDR Charles Swift
Detailed Defense Counsel

From: XXXX. CIV (L)
Sent: Friday, October 29, 2004 3:04 PM
To: XXXX. CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'
Cc: XXXX, CDR, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX, LtCol, DoD OGC'; XXXX; XXXX, COL, DoD OGC'; XXXX, Cpt, DoD OGC'; XXXX; XXXX, GySgt, DoD OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)

Subject: US v. Hamdan, Decision of the Presiding Officer, D27

United States v. Hamdan
Decision of the Presiding Officer, D27

The Presiding Officer has denied the request for production of George Fletcher as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

XXXX
Assistant to the Presiding Officers
XXXX
Voice: XXXX
Fax: XXXX

UNITED STATES OF AMERICA	)	
	)	**DEFENSE MOTION - THE ENTIRE COMMISSION TO GRANT PRODUCTION OF WITNESS DENIED IN D 27**
v.	)	
	)	**GEORGE FLETCHER**
HAMDAN	)	
	)	October 29, 2004

The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert happens to be the foremost expert in America on criminal law, and, in particular, the doctrine of conspiracy. Hamdan is charged with a sole count of conspiracy; Fletcher is Cardozo Professor of Law, Columbia University Law School. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

a. Motion by the defense for the production of the above witness.
b. Decision of the Presiding Officer denying the witness.
c. The government response to this motion.
d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By: _____

Neal Katyal
Civilian Defense Counsel